

# **Exhibit 141**

1 IN THE UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X

4 HERMES INTERNATIONAL and  
5 HERMES OF PARIS, INC.,

6 Plaintiffs,

7 - against -

8 MASON ROTHSCHILD,

9 Defendant.

10 Civil Action No.: 22-CV-00384

11 -----X

12  
13  
14 REMOTE PROCEEDINGS

15 DAVID NEAL, PhD

16 WEDNESDAY, SEPTEMBER 21, 2022

17 4:45 P.M.  
18  
19  
20  
21  
22

23 Reference No.: NY 5462232

24 Reported By: Rita Persichetty  
25

1 Veritext.

2 I'm not related to any party in this  
3 action nor am I financially interested in  
4 the outcome.

5 Any objections to proceeding please  
6 state them at the time of your appearance.

7 Counsel and all present, everyone  
8 attending remotely, can now state their  
9 appearance and affiliation for the record  
10 beginning with the noticing attorney.

11 MS. WILCOX: This is Deborah Wilcox of  
12 the law firm of Baker and Hostetler  
13 representing the plaintiffs Hermes  
14 International and Hermes of Paris. I have  
15 with me Lisa Gehman from our Philadelphia  
16 office.

17 MR. MILLSAPS: And this is Rhett  
18 Millsaps with Lex Lumina PLLC representing  
19 defendant, Mason Rothschild. I have with  
20 me my colleague Chris Sprigman.

21 THE VIDEOGRAPHER: Good. And if I  
22 could ask the court reporter to please  
23 swear in the witness and we can proceed.

24 D A V I D N E A L, PHD,

25 called as a witness, having been sworn

1           by the Notary Public, was examined and  
2           testified as follows:

3       EXAMINATION BY

4       MS. WILCOX:

5           Q.     Thank you.

6                   Good morning your time, Dr. Neal.

7                   Could you please state your full name  
8       for the record?

9           A.     Certainly. It's David Thomas Neal,  
10       N-E-A-L.

11          Q.     What is your home address.

12          A.     It's 615 Vilabella Avenue, Vilabella  
13       is one word, V-I-L-A-B-E-L-L-A, Avenue, Coral  
14       Gables 33146, that's in Florida.

15          Q.     What is your work address?

16          A.     That's the same.

17          Q.     Where are you located today?

18          A.     Let me just turn off my Bluetooth.

19                   Okay. You can still hear me?

20          Q.     Yes.

21          A.     Okay. My computer tried to connect to  
22       my Bluetooth speakers.

23                   Could you repeat the question?

24          Q.     Where are you located today?

25          A.     I'm in Australia. I'm in a hotel in

1 deposition, and then obviously the preparation  
2 for this deposition and the deposition itself.

3 Q. What do you intend to charge for that  
4 work?

5 A. That being?

6 Q. What you just described that you  
7 haven't yet billed.

8 A. Okay. In -- in combination all of  
9 those things?

10 Q. Yes.

11 A. Well, assuming that I use the flat  
12 rate, I would estimate that might be another --  
13 let me just think. Maybe somewhere in the order  
14 of \$9,000.

15 Q. I believe we have just received a copy  
16 of the invoice that you sent to Lex Lumina.

17 MS. WILCOX: Ms. Gehman, could you  
18 pull that up.

19 And is this going to be Exhibit 146?

20 MS. GEHMAN: Yes. Bringing it up  
21 right now. Thank you for bearing with me.

22 MS. WILCOX: Thank you.

23 (Exhibit 146, Invoice to Lex Lumina,  
24 marked for identification.)

25 Q. Dr. Neal, is this your invoice to Lex

1 Lumina?

2 A. Yes, it is.

3 Q. Thank you.

4 What was the understanding of your  
5 assignment in this case?

6 A. I would characterize it as reviewing  
7 the scientific validity and reliability of  
8 the -- the surveys that Dr. Isaacson conducted  
9 and his report in its totality.

10 Also reviewing the nature of the  
11 conclusions that he drew from the data that he  
12 collected and reaching an opinion based upon  
13 that review as to whether his studies were  
14 scientifically proper and whether his  
15 conclusions validly and logically flow from the  
16 data that he collected. And then articulating  
17 that -- the results of that analysis in a  
18 rebuttal report.

19 Q. Did you consider conducting any  
20 surveys of your own?

21 A. Briefly I did consider that.

22 Q. What did you consider?

23 A. Well, I -- I considered the scope to  
24 run an Eveready survey as a rebuttal survey.

25 Q. What do you mean the scope?

1           A.     Well, I -- I briefly considered, I did  
2     not pursue it very far after conversations with  
3     counsel, but I -- I briefly considered whether  
4     there was time and what the broad outline of an  
5     Eveready survey might be in this particular  
6     case.

7           Q.     And what were the reasons for choosing  
8     not to do a survey of your own?

9           A.     Two primary factors. One is that my  
10    understanding is that the defendant did not have  
11    the funds to pay for a survey. Obviously  
12    surveys are expensive. And so my understanding  
13    is there just wasn't enough money to fund a  
14    survey?

15                   And secondly, my understanding --  
16    obviously I'm not an attorney, but my  
17    understanding is that the burden falls on the  
18    plaintiff to prove confusion. And having  
19    reviewed Dr. Isaacson's survey and reaching a  
20    conclusion that that burden scientifically had  
21    not been met, in my view, a survey was  
22    unnecessary.

23           Q.     You have run surveys for defendants  
24    accused of intellectual property infringement in  
25    the past; is that correct?

1           A.     I certainly have done that in the past  
2     that's right, yes, when the budgets allowed for  
3     it.

4           Q.     In fact, you did one for Walmart.  
5     Does that ring a bell?

6           A.     Yes.   And Walmart -- Walmart is  
7     obviously a very well funded entity.

8           Q.     And you also did a survey for Evofem  
9     Biosciences; is that correct?

10          A.     I -- I did.   I need to confirm if they  
11     were the defendant.   And they, again, are a  
12     large pharmaceutical firm.

13          Q.     Well, your survey was in the nature of  
14     a rebuttal likelihood of confusion survey?

15          A.     I'd need to check, but it's -- it's  
16     certainly possible, yes.

17          Q.     And you also did a survey for a case  
18     that was Solid 21 versus Richemont and  
19     MontBlanc; is that correct?

20          A.     That is correct.

21          Q.     And another one for the case Solid 21  
22     versus Breitling, and that one you represented  
23     Breitling; is that correct?

24          A.     That's correct.

25          Q.     And the same -- I forgot to ask you

1 about Richemont and MontBlanc. You represented  
2 those parties in that case; is that correct?

3 A. Yes. Again, all -- all very large  
4 international multinational firms.

5 Q. How much time would you want to have  
6 to conduct an Eveready survey for this case?

7 A. Well, how much time I would want to  
8 have would typically be a minimum of six weeks,  
9 sometimes that's not possible and it can be done  
10 faster, but that would be a -- a -- a  
11 comfortable minimum, in my view.

12 Q. What is the shortest period of time in  
13 which you have ever conducted an Eveready  
14 survey?

15 A. I don't -- I wouldn't be able to  
16 recall that with accuracy. It's -- it's I think  
17 faster than six weeks but I -- I wouldn't be  
18 able to give you an accurate answer to that.

19 Q. Beyond receiving Dr. Isaacson's report  
20 and the pleadings you mentioned in this case,  
21 did you request any additional materials from  
22 Lex Lumina?

23 A. Well, I'm not sure that your question  
24 encompasses this, but obviously I requested  
25 certain data sets that were admitted from

1           A.     Correct.

2           Q.     Okay, thank you.

3                   Actually, let's look at your testimony  
4     from that case.

5           MS. WILCOX:   Ms. Gehman, if you could  
6     pull up the PODS Enterprises versus U-Haul  
7     International testimony.   We'll need to  
8     mark this as an exhibit.

9           MS. GEHMAN:   One moment.

10                   (Exhibit 147, Testimony of defendant's  
11     expert witness David Neal, PhD, marked for  
12     identification.)

13           Q.     Do you recall providing testimony in  
14     the PODS versus U-Haul case in the Middle  
15     District of Florida?

16           A.     Yes, I do.

17           Q.     It's dated September 18, 2014?

18           A.     That seems about right.

19           Q.     We're showing you Exhibit 147.  
20     Testimony of defendant's expert witness David  
21     Neal, PhD.

22           MS. WILCOX:   And if you could please  
23     scroll to the next page.

24           Q.     Do you keep copies of your transcripts  
25     from trial testimony?

1           A.     Not -- not typically.

2           Q.     Have you ever seen your trial  
3 testimony in this case?

4           A.     I don't believe so. It's -- it's  
5 possible that I saw it many years ago, but I  
6 don't have any recollection.

7           MS. WILCOX: And if you can look at  
8 page 3 of that. There where it says near  
9 the bottom, "That's right."

10          Yes, thank you.

11          Q.     And so you were -- you were testing to  
12 create a real world naturalistic scenario. And  
13 if you recall, you told people you'd be looking  
14 at a web page, and you showed them an actual web  
15 page from U-Haul; is that correct?

16          A.     That's correct.

17          MS. WILCOX: And if you can turn to  
18 page 5 of the testimony.

19          Q.     We're in the top quarter of the page.  
20 When I asked you about whether your goal was to  
21 ask about the overall impression from looking at  
22 the website, you said you didn't remember that,  
23 but I'm going to point you to this testimony you  
24 gave. And you see the question:

25                 "So you asked -- when viewing this web

1 page, did you consider asking something more  
2 specific like, look for the word 'pod' and tell  
3 me what you think?

4 "Answer: I did consider that but that  
5 would have been, again, inappropriate. That's  
6 not the -- that would have moved people into a  
7 style of thinking about a website that you don't  
8 normally engage in. When we open a web page we  
9 look at the whole web page. Our eye scans where  
10 it naturally scans. There is not something that  
11 makes us zoom into one particular word. So our  
12 goal here was to ask a question about what the  
13 overall impression from looking at the website  
14 is."

15 Does that refresh your recollection  
16 about the testimony that you gave?

17 A. Yes, but I'm -- I'm not giving a --  
18 that -- in that sentence there I'm not  
19 describing the -- the judgment that I asked  
20 people subsequently to make, which is an  
21 association -- the specific construct that I was  
22 measuring in that survey was association.

23 I'm making the point here that when I  
24 was showing people the website I didn't want to  
25 direct their attention anywhere in particular I

1     wanted them just to have whatever overall --  
2     natural overall impression they normally would  
3     have.

4           Q.     And Dr. Isaacson did the same thing in  
5     his survey with his test, isn't that right,  
6     showing the MetaBirkins.com web page?

7           A.     That's not the -- the problem. He did  
8     do that but he failed to use different  
9     versions -- he -- he could have very simply  
10    solved this problem and kept what you are  
11    rightly pointing out is the goal of a  
12    naturalistic survey.

13                   He could, for example, have created  
14    multiple conditions, one where he just changed  
15    "not your mother's Birkin" to "not your mother's  
16    handbag," but he kept Hermes and he kept the  
17    trade dress. He could have -- that would have  
18    been even more naturalistic, to use your term,  
19    than the control which removed everything.

20                   Secondly, he could have created  
21    another condition where he just removed Hermes  
22    and he kept Birkin, MetaBirkin and the trade  
23    dress. He could have created a version where he  
24    just changed the trade dress. Those would have  
25    been different conditions. They all would have

1           Q.     So you're saying with respondent  
2     ID 65, even though they identified Birkin as a  
3     product put out by the same person that puts out  
4     what was viewed in the test stimulus they should  
5     not be counted as confused?

6           MR. MILLSAPS:   Objection.

7           A.     They -- well, you're assuming that  
8     they're identifying a good there, a Birkin bag,  
9     rather than just repeating back the name -- the  
10    name or the mark that they saw on the page. You  
11    know, if the person had said, Hermes at Q1 and  
12    then had said Birkin bag, then they would have  
13    clearly identified the plaintiff and the  
14    plaintiff's goods?

15           I think what you're trying to do which  
16    is, respectfully, not proper, is say, well, one  
17    answer can satisfy both of those goals.

18           Q.     What was -- let me just take you to a  
19    related question.

20           Does the Q7 response impact the coding  
21    that you did? Or let me ask you this: Did you  
22    take into account the responses in Q7 when you  
23    changed the coding from what Dr. Isaacson had to  
24    your recoding?

25           A.     I did take that into account. So if

1 someone -- I'm trying to find one here. I can't  
2 see one on this page, but if someone had said  
3 nothing in Q1 or said Forbes, but then had said  
4 satchel -- like let's look at Q15. If someone  
5 had said -- sorry, not Q15, respondent ID 15.

6 If that person had said nothing for Q1  
7 but then said satchel and Hermes -- Hermes, I  
8 would have classified that person as confused,  
9 and -- and indeed you'll see I did classify them  
10 as confused.

11 Q. Did -- okay. So is Q4 related to Q7  
12 or is Q4 only related to Q1, in your opinion?

13 MR. MILLSAPS: Objection.

14 A. Well, it depends what you mean by  
15 related. But Q4 was a follow-up to Q1. I gave  
16 Dr. Isaacson the benefit of the doubt, so if  
17 someone -- like in the example I had given, if  
18 someone said satchel at Q4 and then said Hermes  
19 at Q7 I would have given him the benefit of the  
20 doubt and classified that person as confused.

21 Q. Let's go to the next page and look at  
22 a few more examples.

23 So respondent ID 108, explain why you  
24 recoded that one as not confused?

25 A. Well, again, the person has not

1 identified any goods put out by the plaintiff,  
2 all they've done is playback the name Hermes and  
3 the name MetaBirkins.

4 Q. Although in Q7 they say Hermes, in Q4  
5 they say Hermes.

6 A. Correct. But where -- where do they  
7 identify any goods put out by the plaintiff?

8 Q. Well, Q7 the question is: What other  
9 company, person or brand do you believe  
10 sponsors, authorizes or approves whoever makes  
11 or provides the items shown on the web page?

12 A. Yes.

13 Q. And so when the person answers Hermes  
14 there in respondent 108, that's not sufficient  
15 to be coded as confused?

16 A. No, for the -- for the reason that  
17 I've been explaining, because in these  
18 circumstances, like the original Eveready, it's  
19 not enough to just read back the senior user's  
20 name because that actually was affirmatively put  
21 in front of the respondent, right. It wasn't --  
22 because the junior user and the senior user are  
23 using the same name, you've essentially shown  
24 them the senior user's name, you -- not  
25 essentially you have, therefore, you -- you need

1 additional evidence that comes in the form of Q4  
2 that the person is affirmatively thinking of  
3 Hermes. And the way you know that is that they  
4 mention at least some goods or services put out  
5 by the senior user. Person 108 has not done  
6 that.

7 Q. Is it your opinion that if a  
8 respondent used the term "MetaBirkins" that that  
9 shows no confusion?

10 A. Well, it's not -- it doesn't -- it's  
11 not a good -- MetaBirkin, as I understand it, is  
12 not a good put out by Hermes. You can correct  
13 me if I'm wrong about that, but that's my  
14 understanding.

15 Q. That, of course, is one of the  
16 questions in the case is whether people are  
17 confused when they see MetaBirkins.

18 So are you -- you give it -- if you  
19 recall, Dr. Isaacson scores MetaBirkins as not  
20 the same as someone answering Birkin, but he  
21 still gives them a code that counts towards some  
22 level of confusion, and you're saying that  
23 should be given absolutely no weight?

24 MR. MILLSAPS: Objection.

25 A. I think if someone just repeated

1 MetaBirkins and said nothing else related to  
2 Hermes, that would not be -- even setting aside  
3 this issue of the other products, that would not  
4 be sufficient evidence that the person was  
5 confused and thinking of Hermes.

6 Q. Have you seen any court require this  
7 follow-on question that you are describing in  
8 this section of your report?

9 A. Well, depends on what you mean by  
10 require. I -- I mean the original Eveready  
11 survey, which I think was -- I think the  
12 plaintiff lost that at the district level and  
13 then the circuit court, if memory serves,  
14 overturned that and affirmed the survey. So  
15 that obviously is -- is one.

16 I -- I am not aware, although I  
17 wouldn't be because I don't track these legal  
18 dimensions of things, I would not necessarily be  
19 aware of a court rejecting this one way or the  
20 other. You know, rejecting someone who failed  
21 to do this. I don't know that, but I haven't  
22 investigated that, I haven't researched that.

23 I know that whenever I encounter this  
24 issue, including with, you know, very prominent  
25 law firms who run a lot of surveys like this,

1     this issue always comes up, and -- in  
2     circumstances like this, and this is the  
3     standard approach that I have consistently seen.  
4     And I have never -- I have never seen someone  
5     ask this question and then -- in circumstances  
6     like this, and then fail to use the data in the  
7     manner that I'm saying is logically appropriate,  
8     supported by authoritatively treatises and was  
9     used in the original Eveready itself.

10           Q.     Although you have been critiqued for  
11     doing that very thing at least in the Growmark  
12     case. Have you been --

13           A.     But as -- as we saw, the -- the expert  
14     there was clearly wrong in her interpretation of  
15     what Jerre Swann discussed. I -- I have -- you  
16     asked me initially, have you discussed this  
17     issue with Jerre Swann, and I said no. I have  
18     discussed this issue in the past at great length  
19     with -- with his longest term collaborator who's  
20     published multiple times with him, and I know  
21     that what I'm saying is consistent with the way  
22     that Jerre Swann thinks about this issue, at  
23     least as understood by his longest term protege  
24     and co-author.

25           Q.     Who is?

1           A.     That's correct.

2           Q.     And if we could -- you say that that  
3     is -- it's a bottom sentence there of that  
4     section 3.3.14, "A net level of 9.3 percent  
5     confusion fails" -- or I'm sorry, I can't read  
6     that -- "falls comfortably" --

7           MS. WILCOX: Thank you. My eyes are  
8     getting more tired as --

9           THE WITNESS: You're adopting my  
10    Australian accent as the deposition  
11    continues, so ...

12          MS. WILCOX: Well, it will be bad if I  
13    go to my Wisconsin accent.

14          THE WITNESS: Oh, wow. We'll been in  
15    big trouble.

16          MS. WILCOX: Yeah.

17          Q.     All right. So you say that, "It falls  
18    comfortably below commonly accepted thresholds  
19    for establishing a likelihood of confusion in  
20    Lanham Act matters."

21                 And your footnote that you use here  
22    cites to Matthew Ezell and AnnaBelle Sartore,  
23    and they also published in this same volume that  
24    you've been referencing throughout the  
25    deposition and your report?

1           A.     Correct.

2           Q.     Okay.  So are those people that you  
3     rely upon for reliable -- or do you consider  
4     them to be reliable sources on survey  
5     percentages and Lanham Act matters?

6           A.     I mean, that -- that particular  
7     chapter is, you know, I -- I think -- how can I  
8     put this?  It's -- it gives broad ranges.  It's  
9     kind of the inheritance, if that's the right  
10    term, of Jerry Ford who wrote the earlier  
11    version of that same chapter.  And Matt Ezell  
12    and AnnaBelle Sartore worked with Jerry Ford, as  
13    you -- you might know.

14                And so that chapter is useful in the  
15    sense that it provides broad ranges.  It  
16    doesn't, it doesn't provide exact thresholds,  
17    and -- but it provides broad ranges.  And, you  
18    know, I'm not aware of -- you know, typically  
19    the number that people throw around obviously  
20    is -- is 15 percent.  You know, if you get a  
21    confusion number above 15 percent that --  
22    15 percent or higher, that might -- might be  
23    considered evidence of likelihood of confusion.  
24    If it's a less than 15 percent that might be  
25    considered evidence against confusion.

1           You know, I -- I don't have a strong  
2       position on that one way or the other, except to  
3       say that I'm not aware of any -- anyone who  
4       would say that a net level of 9.3 represents  
5       evidence of a likelihood of confusion. I  
6       think --

7           Q.     Well, let's look at their publication.  
8       You reference pages 317 to 334 and you kindly  
9       provided those to us.

10           MS. WILCOX: And, Ms. Gehman, could  
11       you please find those in your documents and  
12       let us know what exhibit number that would  
13       be.

14           MS. GEHMAN: It is Exhibit 142. This  
15       is what you're looking for, right?

16           MS. WILCOX: Yes, thank you.

17           (Exhibit 142, Chapter of a book, marked  
18       for identification.)

19           Q.     Dr. Neal, does this look like your  
20       copy you sent to us of the chapter?

21           A.     It does.

22           MS. WILCOX: Okay. Can we please turn  
23       to the Bates number 32. Thank you.

24           Okay. And actually, the -- it's the  
25       sentence that's at the very top so we need

1 Dr. Neal.

2 MS. WILCOX: And Ms. Gehman is  
3 scrolling as fast as she can to paragraph  
4 43.

5 MS. GEHMAN: I haven't found a faster  
6 way.

7 MS. WILCOX: I know. Okay, thank you.

8 Q. Okay. So as Dr. Isaacson says in 43,  
9 "Next, the survey among NFT purchasers asked  
10 questions to measure confusion, starting with  
11 confusion as to source. Question one asked,  
12 what company, companies, person or people do you  
13 think makes or provides the items shown on the  
14 web page. Be specific -- sorry, be as specific  
15 as possible. If you don't know, please select I  
16 don't know."

17 And you take issue with his use of the  
18 word "items" to refer to the MetaBirkins NFTs;  
19 is that right?

20 A. Correct.

21 Q. What word would you have chosen if you  
22 were conducting the survey?

23 A. I haven't reflected on that deeply. I  
24 didn't need to do that obviously for my  
25 rebuttal, and I was -- since I wasn't designing

1 my own survey. I think that he needed to use  
2 some language that made it clear whether he was  
3 referring to the NFT or to the real world  
4 physical object depicted in the NFT, which I  
5 understand the plaintiff alleges is a Birkin  
6 bag.

7 So any language I think that would  
8 successfully do that, it might -- potentially,  
9 I'd have to reflect on it some more, but it  
10 might be something like provides the NFT shown  
11 on the web page. That would help  
12 disambiguate -- that would help clarify for  
13 respondents that they were being asked not about  
14 the real world item that might be depicted but  
15 the actual NFT itself.

16 Q. But you didn't do anything to actually  
17 test that selection of verbiage for question  
18 one; is that right?

19 A. Well, as I explained, the defendant  
20 didn't have -- doesn't have the money, as I  
21 understand it, to -- for a survey, and because  
22 the burden falls on the plaintiff there wasn't  
23 really scope to do that.

24 But I don't need to do a survey to  
25 know that using the language "items" is

1     ambiguous, and that if I show you a picture of  
2     something and I say what is the item shown, a  
3     reasonable speaker of English might think oh,  
4     it's whatever is depicted in the picture or they  
5     might think it's a reference to the picture  
6     itself. That doesn't require a survey that's  
7     good survey design using language that doesn't  
8     have multiple ambiguous interpretations.

9           Q.     Well, if I told you Dr. Isaacson used  
10    the term "items" so as not to lead the  
11    respondents, would that change your opinion?

12          A.     How would it be leading to use  
13    language that correctly calls out the object  
14    that he's asking people to offer an opinion  
15    about?

16          Q.     So you're saying you don't agree with  
17    that, that wouldn't change your opinion?

18          A.     I'm saying I don't see how an  
19    alternative would be -- an alternative that  
20    correctly identifies the object would be  
21    leading.

22          Q.     Did -- did Lex Lumina provide you with  
23    the expert report that plaintiffs submitted in  
24    this case from Dr Scott Kominers (phonetic)?

25          A.     No.

C E R T I F I C A T E

STATE OF New York)

: ss

COUNTY OF RICHMOND)

I, RITA M. PERSICHETTY, a Notary Public within  
and for the State of New York, do hereby certify:

That DAVID NEAL, PhD, the witness whose  
deposition is hereinbefore set forth, was duly sworn  
by me and that such deposition is a true record of  
the testimony given by such witness to the best of  
my ability.

I further certify that I am not related to any  
of the parties to this action by blood or marriage;  
and that I am in no way interested in the outcome of  
this matter.

IN WITNESS WHEREOF, I have hereunto set my hand  
this 26th day of September, 2022.

A handwritten signature in black ink, reading "Rita Persichetty", is written over a horizontal line.

RITA M. PERSICHETTY